CHARLES LUNDGREN ET AL.

v.

BUREAU OF LAND MANAGEMENT

NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB,
AND DESERT PROTECTIVE COUNCIL, INTERVENOR

IBLA 93-295 Decided May 28, 1993

Interlocutory appeal from a decision of Administrative Law Judge John R. Rampton denying a motion to dismiss grazing appeals for lack of jurisdiction. NV-050-92-01 et al. 1/

Affirmed.

1. Administrative Authority: Generally--Administrative Procedure: Adjudication--Administrative Procedure: Administrative Law Judges--Administrative Procedure: Administrative Procedure Act--Federal Employees and Officers: Generally--Federal Land Policy and Management Act of 1976: Grazing Leases and Permits--Federal Land Policy and Management Act of 1976: Hearings--Grazing and Grazing Lands--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Cancellation or Reduction--Grazing Permits and Licenses: Hearings--Office of Hearings and Appeals--Rules of Practice: Appeals--Rules of Practice: Hearings--Secretary of the Interior

By enacting sec. 9 of the Taylor Grazing Act, 43 U.S.C. § 315h (1988), Congress required the Secretary to provide for local hearings on appeals from a BLM decision cancelling or modifying a grazing license or permit. These hearings are conducted in accordance with the APA, 5 U.S.C. §§ 554-559 (1988), under which the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized

1/ The appeals and appellants are listed in Appendix I.

by law. Under 5 U.S.C. §§ 556, 3105 (1988), the ALJs assigned to OHA are the only subordinates of the Secretary empowered to conduct such proceedings.

2. Endangered Species Act of 1973: Generally

The Endangered Species Act directs agencies to "utilize their authorities" to carry out the ESA's objectives, but does not expand the powers conferred by the agency's enabling Act.

3. Administrative Authority: Generally--Administrative Procedure: Adjudication--Administrative Procedure: Administrative Law Judges--Administrative Procedure: Administrative Procedure Act--Endangered Species Act of 1973: Section 7: Consultation--Federal Employees and Officers: Generally--Federal Land Policy and Management Act of 1976: Grazing Leases and Permits--Federal Land Policy and Management Act of 1976: Hearings--Grazing and Grazing Lands--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Administrative Law Judge--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Cancellation or Reduction--Grazing Permits and Licenses: Hearings--Office of Hearings and Appeals--Rules of Practice: Appeals--Rules of Practice: Hearings--Secretary of the Interior

Under the Secretary's memorandum dated Jan. 8, 1993, a Biological Opinion and incidental take statement issued by the Fish and Wildlife Service pursuant to sec. 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1988), is not subject to administrative review as to the matters decided therein. The memorandum does not deprive an ALJ of his jurisdiction under 43 U.S.C. § 315h (1988) with respect to any other issue pertaining to a grazing appeal.

APPEARANCES: Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management; Karen J. Budd-Falen, Esq., and Daniel B. Frank, Esq., Cheyenne, Wyoming, and
Thomas French, Esq., Fort Collins, Colorado, for Charles Lundgren et al.; Laurens H. Silver, Esq., San Francisco, California, for the Sierra Club; Johanna Wald, Esq., San Francisco, California, for the Natural Resources Defense Council.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

By order dated April 30, 1993, the Bureau of Land Management (BLM), the Natural Resources Defense Council, the Sierra Club, and the Desert Protective Council were granted permission to file an interlocutory appeal from District Chief Administrative Law Judge John R. Rampton's March 5,

1993, order denying BLM's motion to dismiss certain grazing appeals for lack of jurisdiction. The appeals had been taken from BLM "full force and effect" decisions issued pursuant to 43 CFR 4160.3(c), in January 1992: (1) cancelling existing grazing permits; (2) replacing those permits with new ones; (3) eliminating spring grazing use on public land for a period of approximately 75 days after March 1, 1993; and (4) limiting cumulative utilization of "key species" at certain times of the year. 2/ The decisions were issued to implement specific requirements set forth in a biological opinion issued by the U.S. Fish and Wildlife Service (FWS) under section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1988), for the protection of the desert tortoise. 3/

BLM and intervenors stress the limited legal nature of the appellants' interest. We find the concerns of the 32 appellants far from trivial. The appellants describe themselves as "small family ranchers who are completely dependent upon the use of their BLM allotments for survival" and claim that, if BLM's decisions are immediately implemented, "their individual family ranching operations will be destroyed" (Appellants' Brief at 21). They point to Judge Rampton's March 5, 1983, finding that the permittees would be forced out of business.

In a pleading filed with Judge Rampton, counsel for BLM dismissed these concerns by arguing that "[t]here is a shortage of tortoise, not a shortage of sheep" (BLM Response to Motion to Stay, at 2). Counsel also stated:
"The Biological Opinion * * * provides that, if the authorized officer is to be exempt from the criminal prohibitions of the Endangered Species Act, 16 U.S.C. § 1538, he must place his decisions in full force and effect. * * * The authorized officer has no choice if he is to avoid criminal liability" (Response to Motion to Stay at 1-2). Counsel also admonished Judge Rampton that, if he stayed BLM's decisions, "Your Honor may well be subject to criminal prosecution" (Tr. I-24). 4/ The concerns of all parties warrant a careful analysis.

2/ For example, Lundgren's existing grazing permit for the Beacon Allotment (effective from Mar. 1, 1985, to Feb. 28, 1995) authorized grazing 3,250 sheep between Mar. 1 and Mar. 30. The new permits authorizes grazing 382 sheep during an 8-1/2-month period between June 15 to Feb. 28.

3/ Judge Rampton stayed the full force and effect of the appealed BLM decisions. However, it does not appear that BLM actually put its decisions in force and effect when issued in 1992. See Tr. I-14.

4/ If counsel's apparent interpretation of the ESA is applied consistently, BLM's authorized officers could be accused of engaging in criminal activity from the moment the desert tortoise was listed. They allowed grazing to continue without an incidental take statement. We would not expect BLM to foster a legal theory which automatically exposes its employees to criminal charges when an endangered species is listed when another reasonable interpretation is available. Nor would we intentionally choose an interpretation of the ESA which would inevitably create conflicts between the ESA and the Secretary's other mandatory duties if a reasonable alternative exists.

BLM based its motion to dismiss on a January 8, 1993, memorandum from Secretary Lujan to the Assistant Secretary for Policy, Management and Budget, regarding grazing appeals from BLM decisions that are based on FWS biological opinions. 5/ The Secretary observed that regulations and provisions of the Departmental Manual applicable to issuance of biological opinions vest the Secretary's authority in FWS, with no provision for administrative appeal. The Secretary concluded that the Office of Hearings and Appeals (OHA) "has no authority under existing delegations to review the merits of FWS biological opinions," and review of those opinions is limited to Federal district courts. By memorandum to OHA dated April 20, 1993, Secretary Babbitt endorsed Secretary Lujan's directive.

BLM's jurisdictional argument rests on its incorrect characterization of the actions before Judge Rampton. The appeals BLM seeks to have dismissed are not appeals from a FWS biological opinion.

[1] BLM's decisions cancelled and modified grazing permits, administered pursuant to the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315-315q (1988), to include the conditions set out in a FWS biological opinion issued in contemplation of an incidental taking of an endangered species during the course of carrying out a grazing program. Section 9 of the Taylor Grazing Act expressly commands the Secretary to "provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department." 43 U.S.C. § 315h (1988). The Department has long recognized that these hearings are to be conducted by an Administrative Law Judge appointed under 5 U.S.C. § 3105 (1988), in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §§ 554-559 (1988). See 43 CFR 4.470-4.478; E. L. Cord, 64 I.D. 232 (1957). Under the APA, the parties have a right to a decision by an impartial decisionmaker based solely on the record of a proceeding in which the parties have enjoyed the opportunity to confront and cross-examine witnesses, to present evidence under oath, and to the use of a subpoena to the extent authorized by law. See 5 U.S.C. § 556 (1988). Administrative and judicial review is to be based on a record compiled in such a manner. The Administrative Law Judges assigned to OHA are the only subordinates of the Secretary empowered by statute to conduct the hearings required by 43 U.S.C. § 315h (1988). There is no doubt that Judge Rampton's denial of BLM's motion to dismiss was predicated on his view that the motion conflicted with the APA, as well as the Taylor Grazing Act. He made that point quite clear at the hearing (Tr. Mar. 2, 1993, at 4, 7-8).

[2] By contending that OHA lacks jurisdiction to hold a hearing, BLM is essentially contending that the ESA compels the Department to ignore Congressionally mandated requirements for implementing a grazing decision if a FWS biological opinion has issued at some point in the course of events leading to the grazing decision in question. BLM justifies this argument by

5/ The full text of Secretary Lujan's memorandum is set out in Edward R. Woodside, 125 IBLA 315 (1983).

construing the ESA to override mandates established in other legislation. 6/ This construction automatically places the ESA on a collision course with this Department's other enabling legislation, and frustrates the development of coherent procedures to resolve conflicts and issues arising from the Department's various statutory mandates. A recent court decision makes clear that such a construction is unjustified. In Platte River Whooping Crane Trust v. Federal Energy Regulatory Commission, 962 F.2d 27 (D.C. Cir. 1992), re'hrg en banc denied, 972 F.2d 1362 (D.C. Cir. 1992), the court reviewed FERC renewal of annual licenses to operate hydroelectric facilities. The court agreed that, although the commission may be required by the ESA to impose more stringent environmental conditions if it grants new licenses, other statutes required that annual licenses issue under the terms and conditions of an existing license. The court rejected the argument that annual license renewal constituted agency action triggering the formal consultation requirement of the ESA. The court stated:

> The Trust reads section 7 essentially to oblige the Commission to do "whatever it takes" to protect the threatened and endangered species that inhabit the Platte River basin; any limitations on FERC's authority contained in the FPA [Federal Power Act] are implicitly superseded by this general command. Petitioner relies on Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (TVA), the famous "snail darter" case in which the Supreme Court said that section 7's legislative history "reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." Id. at 185, 98 S.Ct. at 2297. We think the Trust's interpretation of the ESA is far-fetched. As the Commission explained, the statute directs agencies to "utilize their authorities" to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act. See Order on Rehearing at 61,752-53. TVA, which did not even consider whether section 7 allows agencies to go beyond their statutory authority to carry out the purposes of the ESA, is hardly authority to the contrary. See id. at 61,752 n. 113. Accordingly, we deny the Trust's petition for review. [Emphasis in original.]

Id. at 34. 7/

6/ Counsel's reliance on the primacy of the ESA is clear from the following statement made before Judge Rampton:

"The BLM does not rely upon its regulations for authority to place its decisions into full force and effect. Rather, BLM asserts that the provisions of 16 U.S.C. § 1536 (a)(2) and (c), as supplemented by the Biological Opinion of the U. S. Fish and Wildlife Service (FWS) authorize this action" (BLM Response to Motion to Stay, at 2).

7/ We recognize that Platte River can be distinguished from the cases before us because BLM is not required to continue grazing use under the same conditions each year. BLM was required to consult with FWS after the desert tortoise was listed. Nevertheless, when the Platte River

We find no reasonable basis for construing Secretary Lujan's memoran-dum as depriving Judge Rampton of jurisdiction over these grazing appeals. Secretary Lujan clearly stated that OHA lacks authority to review the merits of FWS biological opinions. It is equally clear that he did not intend to amend or otherwise alter OHA's jurisdiction over grazing appeals. There is nothing in his memorandum that purports to modify OHA's existing authority in any way, and it expressly states that "OHA is not authorized to 'second-guess' FWS when reviewing BLM's decision." (Emphasis added.) The Secretary explicitly recognized that it was "appropriate" for OHA to review BLM's decision implementing a biological opinion even though matters decided in the biological opinion are not subject to administrative review by OHA. On one hand, denial of Judge Rampton's jurisdiction would violate the Taylor Grazing Act. On the other, we find no justifiable basis for concluding that recognizing his jurisdiction would violate the ESA. An agency's adjudication procedures should be structured to comply with its statutory mandates, and not to violate them. 8/

How OHA exercises its jurisdiction is illustrated by prior appeals from decisions based on FWS biological opinions. For example, in Glacier-Two Medicine Alliance, 88 IBLA 133 (1985), environmental organizations challenged BLM's approval of an application for permit to drill (APD) an oil well. As in the cases before Judge Rampton, BLM's decision was intended to implement conditions set out in an FWS biological opinion. There was no suggestion that OHA lacks jurisdiction to review BLM's decision, and the environmental organizations bringing the appeal were able to obtain review of their claims that approval of the APD violated the

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fn. 7 (continued)
court rejected the argument that the agency was obligated to take further action under ESA, it described the relationship between the ESA and an agency's enabling legislation in a manner having general applicability.

8/ The Board has addressed the procedural coordination of appeals arising from decisions with no right to a hearing with those in which a right to a hearing could be asserted. In Animal Protection Institute of America, 118 IBLA 345, 347-348 (1991), we observed:

"Wild horse roundup decisions may be appealed here directly because no statute or regulation requires a hearing in such a case before an Administrative Law Judge nor is one required as a matter of procedural due process. By statute and regulation, however, each grazing permittee has a right to a hearing before an Administrative Law Judge before grazing reductions can be fully implemented. 43 U.S.C. § 315h (1988); 43 CFR 4.470, 4160.4.

* * * * * * *

"Despite the fact that the regulations divide jurisdiction between this Board and the Hearings Division, the appeals pending in the Hearings Division and before the Board all involve the underlying question of the amount of available forage and the proper allocation of forage between horses and livestock. Shurtz [the grazing permittee] has a right to a hearing which must be satisfied before action can be taken with respect to APIA's contention that the [wild horse] roundups should be set aside on the ground that more forage should be provided to horses and less to livestock." [Footnote omitted.]

National Environmental Policy Act (NEPA), 43 U.S.C. § 4321 (1988), and other statutes. We find nothing in the Secretary's order to preclude consideration of similar issues which might arise in the course of BLM's implementation of a FWS biological opinion.

Before giving consideration to the effect of the Secretary's memoran-dum on the scope of the appeals, we will focus on how the ESA relates to
the Taylor Grazing Act and other applicable legislation. There are obvious issues pertaining to the statutory relationship between the ESA and the Taylor Grazing Act. We have afforded the parties an opportunity to address these issues, but they have offered little in the way of analysis on appeal.

The appellants' permits were issued pursuant to 43 U.S.C. § 315b (1988). This statute specifically provides that permits shall have a term of not more than 10 years, subject to the preference right of the permittees to renew at the discretion of the Secretary of the Interior. Section 315b also provides that, to the extent consistent with the purposes and provisions of the Taylor Grazing Act, recognized and acknowledged grazing privileges are to be adequately safeguarded. However, the creation of a grazing district or the issuance of a permit "shall not create any right, title, interest, or estate in or to the lands." Id. It is well established that grazing permits can be withdrawn at any time without compensation. United States v. Fuller, 409 U.S. 488 (1973).

The Federal Land Policy and Management Act (FLPMA) also provides for 10-year terms "subject to such terms and conditions the Secretary concerned deems appropriate and consistent with governing law, including, but not limited to, the authority of the Secretary concerned to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof * * *." 43 U.S.C. § 1752(a) (1988). Thus, unlike the annual renewal addressed in the Platte River case, BLM does have authority to cancel grazing leases or reduce grazing use, and BLM's implementing regulations authorize placing reductions into effect immediately "in an emergency to stop resource deterioration." 43 CFR 4160.3(c). See Thoman
v. BLM, 125 IBLA 100 (1993). However, BLM does not have the authority to implement an emergency reduction decision without providing a right of appeal to an Administrative Law Judge. See 43 U.S.C. § 315h (1988); Valdez v. Applegate, 616 F.2d 570 (10th Cir. 1980); Hinsdale Livestock Co. v. United States, 501 F. Supp. 773 (D. Mont. 1980). 9/ Congress has repeatedly

9/ In LaRue v. Udall, 324 F.2d 428 (D.C. Cir. 1963), cert. denied, 376 U.S. 907 (1964), which was a pre-FLPMA case, the court held that the Department was not required to conduct an evidentiary hearing at the request of those who protested an exchange even though their grazing permits would be cancelled as a result of the exchange. The court reasoned that the exchange provisions made no provision for hearings, and did not involve decisions by the officials identified in section 9 of the Taylor Grazing Act for which
a hearing was provided. The LaRue decision does not provide authoritative precedent for disregarding the applicability of section 9 in this case. The actions upon which the applicability of the ESA is based are the very decisions for which section 9 mandates an opportunity for a hearing.

affirmed the right to appeal grazing reductions and has repeatedly placed limits on the extent of immediate reductions:

> Provided further, That an appeal of any reductions in grazing allotments on public rangelands must be taken within thirty days after receipt of a final grazing allotment decision. Reductions of up to 10 per centum in grazing allotments shall become effective when so designated by the Secretary of the Interior. Upon appeal any proposed reduction in excess of 10 per centum shall be suspended pending final action on the appeal which shall be completed within two years after the appeal is filed * * *.

Title 1, P.L. 102-381, 106 Stat. 1378 (1992); see also Title 1, P.L. 102-154, 105 Stat. 993 (1991); Title 1, P.L. 101-512, 104 Stat. 1917 (1990); Title 1, P.L. 101-121, 103 Stat. 704 (1989); Title 1, P.L. 100-446, 102 Stat. 1776 (1988); section 101(g), P.L. 100-202, 101 Stat. 1329-216 (1987); P.L. 99-591, § 101(h), 100 Stat. 3341-245 (1986); § 101(h), P.L. 99-500, 100 Stat. 1783 (1986); § 101(d), P.L. 99-190, 99 Stat. 1226 (1985); § 101(c), P.L. 98-473, 98 Stat. 1840 (1984); § 100, P.L. 98-146, 97 Stat. 921 (1983); § 1, P.L. 97-394, 96 Stat. 1968 (1982); § 100, P.L. 97-100, 95 Stat. 1393 (1981); § 100, P.L. 96-514, 94 Stat. 2959 (1980); § 100, P.L. 96-126, 93 Stat. 956 (1979).

We will now examine the ESA. Its stated purpose is to provide a means for conserving ecosystems upon which endangered and threatened species depend, and to provide a program for the conservation of endangered and threatened species. 16 U.S.C. § 1531(b) (1988). Congress stated its policy that all Federal departments and agencies are to seek to conserve endangered and threatened species and "shall utilize their authorities in furtherance of the purposes of this chapter." Id. § 1531(c)(1) (1988). On August 4, 1989, FWS listed the desert tortoise, within its range in the Mojave Desert, as endangered under an emergency ruling. 54 FR 32326. On October 13, FWS published a proposed rule to the same effect. 54 FR 42270. Final rules and regulations listing the Mojave population as threatened were published on April 2, 1990 (55 FR 12178).

The ESA prohibits the "taking" of an endangered species. 16 U.S.C. § 1538(a)(1)(B) (1988). A taking occurs when a challenged activity has "some prohibited impact on an endangered species." Palilia v. Hawaii Department of Land & Natural Resources, 639 F.2d 495, 497 (9th Cir. 1981) (State's maintenance of sheep and goats in critical habitat of an endan-gered species, causing destructive impact on that species, constituted a taking by the State under ESA).

Section 7 of the ESA specifically directs the Secretary to review "other programs administered by him" and utilize such programs in further-ance "of the purposes of the statute." Id. § 1536(a)(1) (1988). Agencies are also required to utilize their authorities in furtherance of the purposes of the ESA "in consultation with and with the assistance of the Secretary." Id. The ESA further provides:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this sec-tion referred to as "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined * * * to be critical.

16 U.S.C. § 1536(a)(2) (1988).

As noted in the Secretary's memorandum, FWS carries out his responsibilities under section 1536(a)(2). FWS prepares its biological opinion in response to a request for consultation. If FWS concludes that the contemplated agency action or reasonable alternatives to that action and the incidental taking of a threatened or endangered species will not violate subsection (a)(2), FWS issues an "incidental take statement" that:

> (i) specifies the impact of such incidental taking on the species,
> (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,
> (iii) [marine mammal provision omitted], and
> (iv) sets forth the terms and conditions * * * that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

16 U.S.C. § 1536(b)(4) (1988). 10/

On January 23, 1991, BLM formally requested FWS consultation, pursuant to section 7 of the ESA, 16 U.S.C. § 1536(a)(2) (1988), and 50 CFR 402.14. BLM's Biological Evaluation for Managing Livestock Grazing in Desert Tortoise Habitat (Evaluation) accompanied its request. The affected allotments were identified and BLM's proposed action was stated in BLM's Evaluation. Subsection (d) of 50 CFR 402.14 required BLM to afford the grazing permittees an opportunity to submit additional information for consideration during the course of consultation. BLM sent a copy of its Evaluation to each of the grazing permittees, and they were encouraged to submit comments and evidence to FWS.

10/ Incidental takings may also be authorized by permits issued under 16 U.S.C. § 1539 (1988). An applicant for the permit must submit a conservation plan setting forth the likely impacts of the taking, measures
and funding to mitigate those impacts, alternative actions, and other measures. If the Secretary finds: (1) that the taking will be incidental; (2) that the applicant will minimize and mitigate the impacts of the taking to the maximum extent practicable and provide adequate funding; (3) that the incidental taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (4) that the required mitigating measures will be met, a permit may issue.

On August 14, 1991, FWS issued its biological opinion that the "proposed licensing" of livestock use within desert tortoise habitat is not likely to jeopardize the continued existence of the desert tortoise. However, the approved BLM proposed action was based on having the grazing program implemented by the decisions under appeal in full force and effect, and were not based on the previously approved program. 11/

The grazing permittees seek to avoid the preclusive effect of the FWS biological opinion by characterizing their appeal as a challenge to BLM's Biological Evaluation. This argument is unavailing. If the permittees believed that the information BLM submitted to the FWS was not the best available scientific information, they should have submitted that information during the consultation period. If they believed that the incidental taking caused by their activities should be permitted on an alternative other than that proposed by BLM, it was also their duty to propose that alternative and explain why it was preferable. Nothing in FWS' biological opinion indicates that the grazing permittees submitted the information and evidence they now seek to place before Judge Rampton. To the extent that an incidental take statement is required, it can only be issued by FWS pursuant to the procedures established under the ESA and its implementing regulations. Once those procedures have been completed, the result is not subject to administrative review, at least for proceedings within OHA, consistent with the Secretary's memorandum.

The appellant permittees argue that FWS should not hold veto power over agency action through issuance of biological opinions, and cite several cases in which courts have sustained agency deviations from the requirements of a biological opinion. Their argument misses BLM's point concerning the effect of Secretary Lujan's memorandum upon agencies subject to his supervision, such as BLM and OHA. Agencies of other departments may be free to differ with FWS; Interior agencies are not. Thus, a FWS biological opinion may not necessarily bar other agencies from exercising the full range of their decisionmaking powers granted by their enabling legislation. The Secretary's memorandum precludes the agencies of this Department from exercising that power. If an Administrative Law Judge were to correctly perceive that the appellants' rights under the Taylor Grazing Act and APA

11/ The decisions on appeal were not issued until the end of January 1992 and although they were captioned as "full force and effect" decisions, it does not appear that BLM put these decisions into effect when issued. See Tr. I-14. Its counsel now states that BLM employees and Judge Rampton may be subject to criminal liability if the decisions are not immediately implemented (BLM's Response to Motion to Stay at 1-2; Tr. I-24), and that our having allowed 15 days to submit briefs "frustrated the measures prescribed by the FWS" (May 4, 1993, Objection to Order of Apr. 30, 1993, at 2). We sense that this apparent concern flows from the flawed premise that the ESA somehow overrides BLM's enabling legislation. The consultation requirement can only be triggered by "agency action," which is authorized by the requesting agency's enabling legislation, and any subsequent "agency action" to implement the biological opinion must also be authorized by the requesting agency's enabling legislation.

had been violated, he would nonetheless, be precluded from considering the issues properly decided in the FWS biological opinion.

[3] In accordance with the Secretary of the Interior's January 8, 1993, memorandum, a biological opinion and incidental take statement issued by the FWS pursuant to section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (1988), is not subject to OHA administrative review with respect to the matters properly decided therein. However, issuance of a biological opin-ion does not deprive an Administrative Law Judge of his jurisdiction over
a grazing appeal under 43 U.S.C. § 315h (1988) with respect to issues not properly within the scope of the biological opinion. This Board has accepted this interlocutory appeal for the sole purpose of clarifying Judge Rampton's general jurisdiction, and we have not undertaken an examination of each of the 32 individual appeals to determine which other issues, such as NEPA compliance and compliance with an applicable appropriation rider might be addressed in one or more of those appeals. Our disposition of this interlocutory appeal in no way prevents Judge Rampton from considering motions for summary dismissal in individual cases. 12/

Finally, we turn to BLM's contention that Judge Rampton erred in staying BLM's decisions. We recognize that endangered species are a resource
on Federal lands and emergency action under BLM's grazing regulations may
be necessary for their protection. See 43 CFR 4160.3(c). 13/ Nevertheless,

12/ Although there is no basis for taking evidence on any issue for which the FWS opinion is preclusive, if resolution of other issues involves evidence that might otherwise be foreclosed because of the preclusive effect of the FWS opinion, Judge Rampton's duties under the APA and Taylor Grazing Act may require him to include such evidence in the record to the extent that it is admissible.

13/ BLM`s argument is erroneously based on the premise that a decision to place a grazing decision into full force and effect could be made without reference to BLM's regulations that govern such actions under the Taylor Grazing Act (BLM's Response to Motion to Stay at 1-2). As Platte River, supra, suggests, such power comes from an agency's enabling legislation and its implementing regulations. The authorized officer may place a decision in full force and effect "in an emergency to stop resource deterioration." 43 CFR 4160.3(c); see also 43 CFR 4.477. If an authorized officer has acted, the "action taken by the authorized officer" is subject to "modification or revocation by the Administrative Law Judge or the Board upon an appeal from the decision." 43 CFR 4.477(c). For example, an authorized officer's decision to place a decision into full force and effect may be reversed if an Administrative Law Judge concludes that it is not supported in the record. See Thoman v. BLM, 120 IBLA 302 (1991). A finding of emergency normally requires an evaluation of current conditions, see Thoman v. BLM, supra; Hinsdale Livestock Co. v. United States, 501 F. Supp. 774, 776 (D. Mont. 1980). The standard in such cases is not the same as that set out in Marathon Oil Co., 90 IBLA 236, 93 I.D. 6 (1986), which we have applied when a regulation automatically places a decision in effect pending appeal without specifying the criteria for doing so.

under the circumstances of this interlocutory appeal, we also believe it inappropriate for us to consider placing BLM's decisions in effect. BLM seeks a blanket order placing all of the decisions on appeal in effect. Doing so for all appeals may result in unintended adverse consequences. For example, putting BLM's decision in the Lundgren appeal into effect would apparently authorize Lundgren to place sheep in the allotment from June 15 to the end of next February, even though the allowable annual forage may have been consumed this past March. The threat to tortoises may well be exacerbated by further diminishing forage for tortoises if we were to place all of the decisions in effect now. That determination should be made on a case-by-case basis. On remand BLM will be able to renew its request that the stay be lifted, and its justification for doing so can then be considered by the Administrative Law Judge.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Rampton's decision denying BLM's motion to dismiss is affirmed, and the case is remanded to Judge Rampton for further proceedings consistent with this decision.

R. W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

APPENDIX I

Appeal	Appellant
NV-050-92-01	Charles Lundgren and Roy Lundgren
NV-050-92-03	Joe V. Higbee & Sons
NV-050-92-06	Henry Rice
NV-050-92-07	Henry Rice
NV-050-92-08	Henry Rice
NV-050-92-09	Francis Lytle and James Wade
NV-050-92-10	Staheli Farms
NV-050-92-11	Jean Bradshaw
NV-050-92-12	Charles & Donald Wadsworth
NV-050-92-13	Keith Cutler
NV-050-92-15	Leo Stewart
NV-050-92-16	William Mull
NV-050-92-17	John Bowler
NV-050-92-18	Fenton Bowler
NV-050-92-19	Bar CC Cattle Company
NV-050-92-21	Arrowhead Cattle Company
NV-050-92-22	David Bundy
NV-050-92-23	Gold Butte Ranches, Inc., c/o John Frei
NV-050-92-24	James Hayworth
NV-050-92-25	Melburn Jensen
NV-050-92-26	Victor B. Knight
NV-050-92-27	Edwin O. Larson
NV-050-92-29	Paul C. Lewis
NV-050-92-31	Keith Nay
NV-050-92-32	Charles Lundgren and Roy Lundgren
NV-050-92-33	Charles K. and Jacqueline Simmons
NV-050-92-34	John Wittwer
NV-050-92-35	Donald G. Whitney
NV-050-92-36	Lonesome Dove Cattle Company
NV-050-92-37	C. A. Lewis
NV-050-92-38	Keith Cutler